LAW OF THE EUROPEAN UNION

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In the early 1950s, when a few Western European countries created the first sparks of European integration, no one on either side of the Iron Curtain thought that these economic entities of limited size and competence would form the basis of what would in a few decades become a United Europe. Indeed, today's shape of the European Union (EU) with 25 countries joining together more than 450 million inhabitants from all over Europe, who, in a space without frontiers, can share their common interests and values and exercise their rights and freedoms, is much different from that of the early beginnings of the European Communities. Yet the EU is currently, maybe more intensively than ever, facing many challenges that are to a large extent connected to the radical changes that the EU has gone through in recent years. Although the citizens are to a considerable degree beneficiaries of the EU and its enlargement, it is the same citizens who at the same time question the legitimacy of the Union and its meaning in their everyday lives.

Many of these questions and doubts can be answered, and asking questions and giving answers can benefit both the citizens and the EU. The answers can help citizens learn about the advantages the EU can bring to their lives and how to make use of them, and what tools to use if things are not working the way they should. By the same token, informed and engaged citizens may be an indicator for the EU that it is following the right path and providing space for democratic processes and their legitimate results.

The EU is a very complicated complex of rules, cultures, relations and opinions that cannot be explained or summarised in a work of this length. It is neither the ambition of this text to give such a summary. Instead, it aspires to give basic background information to those who are interested in knowing more about the EU by learning about the processes that accompanied its development from the beginnings of its existence till now, about the objectives of the Union and about the activities through which these objectives are supposed to be fulfilled, about the institutions that are supposed to achieve the objectives of the EU and perform its tasks, about the principles which both EU institutions and the Member States are supposed to follow, and also about the rights individuals can enjoy as EU citizens. The first part of the text thus offers a short introduction to the EU as such, its laws and the specific advantages the EU brings to its citizens. The second part will deal with selected human right issues related to the EU and its functioning.

1. The European Union and its legal order

1.1. What is the European Union?

The history of the EU dates back to the middle of the 20th century when Europe struggled with the social and economic consequences of the Second World War. The heads of six European states – Belgium, France, Germany, Italy, Luxembourg and the Netherlands – decided to try to overcome the post-war hardships by establishing economic coalitions that would remove the obstacles to the economic development of these countries and thus increase the quality of life of their citizens. These coalitions included the European Coal and Steel Community (ECSC, 1951), the European Atomic Energy Community (EURATOM, 1957), and the European Economic Community (EEC, established in 1957, today the European Community, EC).

The communities mentioned above form the basis of what is today known as the European Union, established by the Treaty on European Union (TEU), signed at Maastricht in 1992 (hence the ´Maastricht Treaty´), that came into force on 1 November 1993. Examples of the main objectives the Union is trying to achieve are: promoting economic and social progress in the Member States which will form an area without internal frontiers, where free movement of goods, persons, services and capital will be guaranteed; establishment of economic and monetary union; introducing Union citizenship and strengthening the rights and interests of the nationals of the Member States; increasing the level of employment, strengthening social cohesion and thus increasing the quality of life. EU Member States are also trying to push through a common foreign and security policy and extend cooperation in the field of justice and home affairs.[1] The abovementioned objectives and fields of activities of the Union are organised into three pillars that create the structure of this entity. The first pillar is made up of the abovementioned European Communities, the second is represented by a common foreign and security policy and the third pillar represents cooperation in the field of justice and home affairs. The structure and objectives of the EU clearly indicate that the prosperity and stability of the European region cannot be based exclusively on economic integration, but are rather a result of policies and efforts that follow from common values based on respect for the principles of solidarity, democracy and human rights that are essential for the functioning of organised communities.

Currently, the EU has 25 members. In 1973, the original founding members were joined by Denmark, Ireland and the United Kingdom. Other enlargements followed in 1979 (Greece), 1986 (Spain and Portugal) and 1995 (Austria, Finland, and Sweden). In May 2004, the following ten European countries became the newest members: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. In order to access the Union, these new Member States had to fulfil certain political and economic criteria – for example the existence of the rule of law, respect for fundamental rights and freedoms and protection of minority rights, respect for the rules of the market economy and the ability of the country to cope with the competitive pressure coming from the EU. That is why, before the accession, the new Member States had to harmonise their legal orders with the legal order of the EU.

1.2. EU Law and EC Law

The law of the European Community (EC law) is often mentioned in relation to EU law. It is sometimes also called Community law or *acquis communitaire*. EC law is an area of law that, although being a part of EU law, is narrower in its scope as it represents only the first pillar of the Union. The provisions belonging to this pillar are legally binding. As has been mentioned in the previous section, the first pillar is not the only pillar - common foreign and security policy and justice and home affairs represent the Union´ s second and third pillars. Cooperation of Member States under the second and third pillars is more political and not legally binding.

The European Community and its law were established by the Treaty Establishing the European Community (EC Treaty) that constituted the legal basis for the functioning of the EC and in many cases also the functioning of the EU (for example, it established the EU institutions and the concept of the citizenship of the Union). When we talk about EU law, we often have in mind those provisions and legal relations that are based on the EC Treaty and that in fact represent Community law (EC law). Due to its limited size, this text will predominantly discuss EC law. It will therefore not deal with issues related to the second and third pillars of the Union.

[1] TEU, Article 2.

EC/EU law is not a typical legal order as we know it from individual countries. The EU/EC systems are currently[2] not based on a traditional constitution that regulates the fundamental relations between the state and its citizens and contains a legally binding and comprehensive catalogue of fundamental rights and freedoms. Furthermore, this legal order does not recognise the traditional division of power among legislative, executive and judicial branches (where the parliament adopts laws, the government or the executive executes them and independent courts guarantee that those who are subject to the law fulfil their obligations), even though it would be possible to find elements of all three branches of power in it. Moreover, some important elements of functioning of the EC/EU are not regulated in the founding treaties, but result from the decision-making activities of the European Court of Justice (ECJ) – a judicial institution of the EU. The ECJ has filled many gaps and clarified many unclear issues in EC/EU law. This fact is partly a result of the UK membership in the EU. The British legal order is to a large extent based on judicial decision-making.

These facts result from several factors. Most significantly, EC/EU law does not only regulate mutual relations between citizens of certain states and their relations to those states, but it also regulates mutual relations between several states and the European Community that concern inhabitants of these states and that are often also binding for these inhabitants. If the individual Member States wanted to preserve at least some of their sovereignty and the possibility to take decisions on important issues related to their territories and inhabitants, they had to agree on or submit to rules that would enable them to preserve their national specificities, legal orders, economic potentials and interests of their inhabitants, and that would, at the same time, ensure that the individual states and their inhabitants could "start" from the same positions and get the same opportunities for fulfilling their interests.

The relationship between the EC and the Member States and their legal orders is governed by several important principles. One of these principles is that the EC cannot adopt any rules in any field. It can only act in areas where it has competence to act. In some areas, the EC has exclusive competence to act – i.e. to adopt rules that bind all Member States. This is for example the case of removing barriers to free movement within the internal market, the regulation of international transport, monetary policy, and the common commercial policy. Then there are areas where the Community competence is not exclusive – i.e. where both the EC and the Member States are allowed to adopt measures. These are areas like employment and social policy, economic and social cohesion, research and technological development, protection of the environment and general aspects of transport policy. However, if the EC wants to act in these non-exclusive competence fields, it has to show that the objective of the proposed action cannot be sufficiently achieved by the Member States themselves and can therefore be better achieved by the Community. In short, this principle (which is in legal language known as the **principle of subsidiarity**) means that public powers should normally be located at the lowest levels of government where they are closest to citizens and where they can be exercised most effectively. Lastly, there are also areas where the EC is not authorised to act at all (i.e. areas where it has no competence) – which is for example the case of family and criminal law, culture and tourism. Here, it is up to each state to set rules for these particular fields.

Another important principle that governs the relationship between EC law and the legal orders of individual Member States is the **principle of supremacy**, which says that in cases of conflict, EU law takes precedence over the law of individual Member States. The ECJ introduced this principle in the famous case of *Costa v ENEL*[3] where it ruled that by creating the European Community, the Member States have limited their sovereign rights and thus created a body of

[2] This text was completed in January 2006.
[3] C-6/64 *Costa v ENEL.*

law which binds both their nationals and themselves. This is to ensure the uniformity of EC law and its interpretation by the national courts of the Member States.

Although we said above that the EC/EU does not have a typical written constitution, it should also be said that the EU has been attempting to adopt one. For several years, representatives of the Union have been fully aware of the fact that the EU is facing numerous challenges that need to be tackled. One of these challenges has been the increasing number of the Union Member States and thus the increasing number of its citizens, which is having impact on all processes going on within Europe. Another of the challenges has been the question of how to make the EU less distant to citizens and reduce its "democratic deficit" which is being mentioned within the EU context with continuously higher frequency. In other words, in proposing the European Constitution, the representatives of the Union were trying to achieve a more democratic, transparent and efficient Europe.

That is why, in 2002, the European Council convened a Convention composed of 105 members representing the governments of the Member and Candidate States[4], the national parliaments of these states, the European Parliament, and the Commission. The Convention submitted a draft of the Constitution to the Presidency of the European Council on 18 July 2003. After demanding and lengthy negotiations, the top representatives of all EU Member States agreed on the final text of the Constitutional Treaty on 17 and 18 June 2004.

The Constitutional Treaty substituted all Treaties that are currently in force and incorporated all the binding rules contained in them into one comprehensive constitutional document. Correspondingly, the draft of the Constitution replaced the "European Union" and the "European Communities" with only one "European Union".

The Constitutional Treaty proposed to achieve its objectives of improved democracy and better effectiveness of the Union by various measures contained in four parts. Among other things, the Constitution:

- Incorporated the Charter of Fundamental Rights directly into its text, which will make the Charter legally binding in the event that the Constitutional Treaty is ratified.

- Contained a clearer presentation of the distribution of competencies and a simplified set of legal instruments and procedures. According to the Constitutional Treaty, both the European Parliament and the Council would be obliged to meet in public when examining and adopting a legislative proposal, which should bring transparency into proceedings.

- Revised the currently-existing institutional framework – it clarified the respective roles of the European Parliament, the Council and the Commission, and created the post of Union Minister of Foreign Affairs.

- Changed the rules of decision-making in the Union and enhanced the role of national parliaments.

- Provided additional environmental protection.

- Imposed new obligations on European institutions regarding the consultation of civil society, transparency and openness in decision-making processes.

[4] When the Convention started its action, the EU only had 15 members and thus those states that were at the time of the Convention candidate countries are today Member States as well.

The Constitutional Treaty was supposed to come into force if ratified in all Member States in accordance with their domestic constitutional requirements (approval by a national parliament and/or a referendum). However, the process got blocked in 2005 when the citizens of two Member States – the Netherlands and France – rejected the Constitution in their national referendums. Thus, European citizens to whom the European representatives promised to bring more democracy and legitimacy through the Constitution refused it in a democratic process.

1.3. Institutions of the European Union

The specificity of the EU objectives, together with the efforts of individual Member States to preserve their autonomy in decision-making and determine the direction of the Union development and the creation of rules that would be binding for all, are reflected in the way the EU institutions were established, in the way these institutions work and in the kinds of legal acts they adopt. The main EU institutions are: the European Council, the Council, the Commission, the European Parliament and the European Court of Justice. EU institutions include other, specialised bodies, such as the Court of Auditors, the Economic and Social Committee, the Committee of Regions, the European Investment Bank and the European Ombudsman.

The European Council is the main political body of the EU. It consists of the heads of states or governments of the individual Member States and the President of the European Commission, who are assisted by the ministers of foreign affairs of the Member States. The heads of the individual Member States decide on the framework directions of the EU's further development at its meetings, called summits, which, as a rule, are held twice a year. The meetings of the representatives of the European Council always take place in one of cities of the state that currently holds the Union Presidency.

Many people confuse this institution with the Council of Europe, which has nothing in common with the European Council.. The Council of Europe is an international organisation associating 46 European countries (all EU Member States are members of the Council of Europe) that was established in 1949. One of the objectives of the Council of Europe is the protection of human rights. In 1950, the member states of the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention, ECHR).

The Council of the European Union (often called just "the Council") - the most important legislative institution of the EU - has its seat in Brussels. Although several institutions participate on the adoption of legally binding acts at the EU level, without the consent of the Council, almost no legally binding act can be adopted.

The Council is composed of members of governments of individual Member States at the ministerial level and thus represents the interests of the individual states. Even though there is only one Council, different ministers are invited to different meetings, depending on the particular areas and issues to be discussed. That is why the Council has around 15 formations that meet regularly – e.g. the ministers of foreign affairs, the ministers of finance, agriculture, environment, education, and the like. One of the members always presides on the Council for six months on the principle of rotation. This means that all Member States hold the Presidency one by one, according to a pre-set order. The Council meets several times a year, which is more frequently than the European Council.

The European Commission (the Commission) is an EU institution with its seat in Brussels. It is responsible for several different tasks. In most cases it has the right of legislative initiative. In other words,, it proposes the adoption of legally binding documents that are later approved by the Council (mostly after previous consultations with the European Parliament or in a co-

decision procedure with it). Apart from the legislative initiative, the Commission can in certain circumstances adopt legally binding acts by itself. The Commission also fulfils executive roles. Furthermore, it is sometimes called the “guardian of the Treaties”, as it secures supervision over fulfilling obligations stemming out of EC law by individual Member States. In the event of non-compliance with these obligations, the Commission has the right to initiate proceedings that can lead to imposing a fine a the Member State by the ECJ.

Currently, the Commission has 25 members, one Commissioner per Member State. As a whole, the Commission is approved by the European Parliament. Each of the Commissioners is responsible for a specific area of Community activities. The Members of the Commission act independently in the performance of their duties. This means they do not represent their Member States, nor can they take instructions from their governments. Instead, they represent the interests of the EU.

The European Parliament (the Parliament) is a representative body of the EU with its seat in Strasbourg. However, the Parliamentary committees have their sessions in Brussels and the administration work in Luxembourg. After the enlargement of the EU in 2004, the Parliament ended up with 732 members who represent more than 450 million EU citizens. Members of the Parliament are elected by the citizens of the Union in direct elections every five years. They work in political, not national blocs, which means that they are not organised according to their country of origin, but according to their political opinions. The number of MPs from each Member State is derived from the number of inhabitants living in that state.

Although the Parliament is active in the field of the preparation and adoption of European legislation, it is not a typical law-making body. It has no right of legislative initiative - it is mainly the right of the Commission to submit proposals of EU legal acts. However, in many cases of adoption of European legislation, the Parliament has co-decisive powers, or the Council is at least obliged to consult with the Parliament.

The Parliament has several supervisory powers. It receives and discusses reports about the activities or other issues connected to the activities of some EU institutions, such as the Commission and the European Ombudsman. In relation to the Commission, the power of the Parliament also lies in its right to pass a vote on a motion of censure that may lead to the resignation of the Commission. Besides, every EU citizen has the right to address the Parliament with petitions, both individually and collectively.

The European Court of Justice (ECJ), with its seat in Luxembourg, has an indispensable place in the institutional system of the EU. Together with the Court of First Instance (CFI) which decides more simple matters, the ECJ constitutes a system of judicial institutions of the European Community. Each Member State is represented in the ECJ by one judge. The Court should not be confused with the European Court for Human Rights (ECtHR) in Strasbourg, which watches over compliance with the provisions of the European Convention signed in 1950 by the states of the Council of Europe.

The ECJ does not decide disputes between individuals. Its task is to ensure that the law is observed in the interpretation and application of the EC Treaty. If the ECJ declares that a Member State has not fulfilled its obligations under the EC Treaty, it can even impose a fine if the state does not bring the breach into compliance with EC law. Similarly, the ECJ supervises individual EU institutions in their activities and makes sure that they fulfil their obligations. If this is not the case, the ECJ can declare the decisions of individual EU institutions to be void (if, by their adoption, the European institutions have violated the law) or, on the contrary, the ECJ can bind a European institution to adopt a decision that was not adopted due to non-compliance of this institution with its obligations. In all of these cases, it is the right of the other Member States,

the Commission and the other EC institutions to initiate proceedings before the ECJ. An exception can only be applied when an individual is directly affected by a decision of some of the Community institutions or if the decision is directly addressed to him or her. In this kind of proceedings, such an individual has to be represented by a lawyer.

The ECJ also fulfils a very important role in the interpretation of the provisions of the EC Treaty or in the interpretation of legally binding acts of the Community (for example, specific provisions of regulations or directives), and in decision-making on their validity. For example, if while two individuals from one Member State are involved in a dispute that is being resolved by a national court, a situation occurs in which it is first necessary to resolve an issue connected to European law, the judge of the national court is entitled to address the ECJ and ask for an interpretation of the contested provision. In some cases judges of national courts are even obliged to address the ECJ with requests for interpretation. After the ECJ interprets such a disputable provision in the so-called preliminary rulings procedure, the national judge decides the case in the light of the interpretation declared by the ECJ. It clearly follows from the abovementioned that national judges who, in their Member States, decide domestic issues that also concern European law, have to have a good knowledge of EC law in order to know when some issues need to be preliminarily resolved on the European level. The same holds true for attorneys who represent their clients in such cases.

It was the abovementioned type of proceedings before the ECJ that had an enormous impact on the development of EC law. The ECJ has resolved many issues for which there were no answers in the provisions of the EC Treaty. This was the way in which the doctrines of supremacy and direct effect, the principle of non-discrimination and the principle of protection of fundamental rights became part of the European legal order, together with other important legally binding doctrines and principles. The ECJ has managed to fill many gaps in EC law and its decisions have become a very important source of knowledge of the European legal order.

The European Ombudsman (the Ombudsman) is a person appointed by the European Parliament. His or her mission is to receive and investigate complaints from EU citizens or other persons residing in the Union that deal with instances of maladministration in the activities of the Community institutions, with the exception of its judicial bodies. Cases of maladministration may also be investigated by the Ombudsman on his or her own initiative. One of the results of the Ombudsman´ s activities has been the conclusion that the non-existence of rules governing access to documents of individual EU institutions due to the fact that these institutions have not issued such rules constitutes a violation of the principles these institutions are supposed to follow. As a consequence of this opinion expressed by the Ombudsman, providing information by EU institutions about their activities to EU citizens has improved. The importance of this institution also lies in the fact that to date, the Ombudsman has, on numerous occasions, referred to the EU Charter of Fundamental Rights, which at the moment is not a legally binding document. There is no doubt that by highlighting the Charter in this way, it is gaining greater weight and authority.

1.4. Sources of EC Law

The sources of law provide us with information on legal rules that are currently in force in a particular legal order. They include documents adopted in agreed unified forms and resulting from agreed unified processes that are based on strict rules. In most legal orders, typical sources of law are constitutions, acts, governmental decrees and orders issued by particular ministries. There are also countries, mainly those belonging to the Anglo-American legal family, whose court decisions form important sources of law.

Like democratic countries with functioning legal orders, the EC can only function thanks to the mechanisms that facilitate the establishment and observance of the rules adopted by particular EU institutions. These rules are expected to finally result in improving the position of EU citizens. Therefore, the EU law safeguards mechanisms enabling individuals to enforce their rights in particular Member States.

The **Treaty Establishing the European Communities** (EC Treaty) is the key source setting the rules that govern the functioning of the EC. Its particular articles stipulate the basic principles which are often specified in more detail in other Community acts issued by its institutions (regulations, directives, decisions and recommendations). These principles are often specified in more detail in the national legal orders of particular Member States.

Some provisions of the EC Treaty have a so-called direct effect. Direct effect means that if a certain provision confers rights on individuals, is sufficiently precise and simultaneously meets other requirements stipulated by the ECJ, the individuals subject to a violation of their rights stemming from this provision are entitled to claim these rights before their respective national courts; this also applies to their relations with other individuals (i.e. not only to their relations with particular states and their bodies). An example of a provision that has direct effect is Article 141 of the EC Treaty that imposes an obligation to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Thus, if a female worker carries out work equal to that performed by her male colleague employed by the same employer and is not paid equally, she can appear before her national court and ask for a resolution of this dispute, alleging that her employer is in violation of an EC law provision with direct effect and is thus obliged to compensate her for the difference in her wage. Provisions regulating free movement of goods or free movement of persons are of the same nature as the abovementioned provision on equal pay.

Regulations constitute another source of law, used by the EU institutions to set up the rules regulating the functioning of relations in the EU. One of the characteristic features of regulations is their direct applicability, which means that once they are issued in the Official Journal of the European Union, they become legally binding in all Member States, without any further need for the Member States to adopt special legal acts on the national level (such as a special law that would govern the issues already contained in the regulation). Thus regulations are automatically binding for everybody. Very rarely, Member States adopt specific provisions in order to bring the provisions of a regulation into practice. This has only happened in a limited set of cases, for example if it is expressly required by the regulation concerned, or if there is a need to establish procedural mechanisms to bring provisions stipulated in a regulation into practice. Some regulations can also have direct effect, under the conditions required for direct effect in the case of EC Treaty provisions.

Directives also constitute a highly important source of EC law. Like regulations, directives establish binding rules to regulate specific fields of life. However, contrary to regulations, directives are only addressed to Member States, which are subsequently obliged to bring the requirements contained in the directives into life, for example via adoption of a special law or some other legally binding act. Accordingly, a directive sets the goal which is to be reached and it is up to each particular Member State to choose the actual forms and methods to be used to achieve that goal. Each directive contains a provision specifying the time period provided for Member States to do so.

Most directives include a preamble – an introductory, legally non-binding part which usually summarizes the background for the adoption of the directive concerned and often includes recommendations exceeding the scope of the legally binding provisions of the directive.

Preambles often allow us to read between the lines and help us to specify the direction which the European Union may choose to follow in the future.

The ECJ has dealt with a number of issues relating to the obligations of Member States and their citizens to follow provisions of directives. In its judgements the Court clearly states that the Member States cannot try to "exculpate" their inability to transpose a directive by referring to, for example, a full legislative schedule on the national level. In this respect, the ECJ notes that EU citizens cannot pay for the incompetence or inconsistency of their national governments in fulfilling their duties. Therefore, in some cases citizens may directly seek fulfilment of certain obligations of their Member States or their bodies that the state or its bodies have towards them and that are contained in a directive which has not been transposed into the national legal order by the time stipulated in the directive concerned.

In other cases, EU citizens may bring proceedings before national courts to claim damages from their own states for being deprived of the possibility of enforcing their rights which would have belonged to them if their national governments had ensured the transposition of a directive into the national legal order. The ECJ introduced this principle in its famous *Francovich*[5] ruling, which concerned a case where Italy had failed to transpose into its national legal order a directive that required Member States to establish institutions and mechanisms providing guarantees of payment of unpaid wage claims to employees in the event of the insolvency of their employers and thus their inability to pay wages. Consequently, Mr. Francovich and other affected employees could not get the money they had earned. The ECJ stated that should such a situation arise, EU citizens cannot pay for the failure of their national states to fulfil their obligations, and thus Italy was liable for the loss and damage sustained by the employees.

However, it may also happen that a Member State transposes a directive into the national legal order but fails to do it properly – for example due to an incorrect interpretation of some of the provisions of the directive or the excessive use of its powers resulting from the directive concerned. Here the ECJ confirmed that in the event that a state gravely breaches the scope of its discretion, it has to be held liable for the resulting loss and damage sustained.

Member States are always liable for breaching their obligations, regardless of whether they caused the specific damage or not; the fact that a state has breached its obligations is of decisive importance here. The obligation of Member States to transpose directives into their legal orders falls among those resulting from their EU membership[6]. The breach of such obligation may even result in penalising a Member State by the ECJ.

The requirements applicable to direct effect of EC Treaty provisions or of provisions contained in regulations apply also to direct effect of directives (with the exception of direct effect applied between individuals).

Along with regulations and directives, the European law also deals with **decisions and recommendations. Decisions,** as opposed to regulations and directives, are always addressed to particular subjects of law or to groups of individuals who can be precisely specified. Also, they can be addressed to particular states. **Recommendations** are not binding. However, they often reflect the way in which particular spheres of EU law are expected to develop in the future. They help to substitute the lack of competence of the EC/EU to resolve some issues of interest because these issues fall under the competence of Member States (for example some issues of labour law). However, it sometimes happens that some provisions initially contained in recommendations may eventually become binding rules. This happened in the case of the Commission Recommendation on the Protection of the Dignity of Women and

[5] C-6/90 and 9/90 *Francovich and Bonifaci v Italy.*
[6] Article 249 of the EC Treaty.

Men at Work of 1991[7]. Some provisions of this recommendation relating to harassment in the workplace became legally binding after they were incorporated into anti-discrimination directives adopted after 2000.

The EC/EU also uses **other instruments of *"soft law"*** – declarations, recommendations and other legally non-binding acts. Although not legally binding, their relevance dwells in the fact that they reflect the EC/EU values, policies and desired future directions. Examples of these soft-law measures are various declarations of the EU institutions that were issued on several occasions relating to various social events taking place in Member or non-member states, and the EU Charter of Fundamental Rights. These legally non-binding acts may often cast light on the interpretation of EC law.

As we said earlier, an important part of EC law is the set of **general principles** that the ECJ has developed over the years of its existence to fill the gaps in EC law as regards matters the founding treaties were silent or equivocal about. These general principles, which also belong to sources of Community law, bind Member States as well as Community Institutions. Some of them have already become parts of legally binding documents. Here are some examples of these general principles:

- *The principle of legal certainty* requires that Community rules must enable those concerned to know precisely the extent of their obligations. The principle also applies when Member States adopt rules when required or authorised to do so by EC law. Here Member States are bound to implement directives in a way which meets the requirements of clarity and certainty.

- *The principle of non-discrimination* means that comparable situations may not be treated differently, and different situations may not be treated in the same way, unless such treatment is objectively justified.

- *The principle of respect for fundamental rights.* According to the ECJ, protection of fundamental rights (which are part of the common constitutional traditions of the Member States and contained in international human rights treaties) is implicitly recognised by EC law and is capable of limiting the competence of the Community. Fundamental rights must also be respected by the Member States when implementing Community measures.

- *The right to make one's point of view known* applies to persons whose interests are affected by a decision taken by a public authority.

- The principle of confidentiality of certain communications between a lawyer and his or her client.

- The principle of good/sound administration.

1.5. The Single Market and its Four Freedoms

Initially, the European Communities were established with the aim to create a strong economic entity able to safeguard stability within the European region and compete with the strong American market. The economic coalitions were expected to bring economic prosperity resulting in consequential improvement of living conditions of the citizens of the Communities.

[7] *Commission Recommendation on the Protection of the Dignity of Women and Men at Work,* November 27, 1991, Commission document C (91) 2625.

These goals were supposed to be achieved via four basic freedoms which remain fundamental in the functioning of the entire EU. These freedoms include: free movement of goods, free movement of persons, free movement of services and free movement of capital.

The authors of the concept of the single market based their theories on the assumption that if all goods produced within the EC territory can be freely moved and sold in all Member States, if all inhabitants and companies can freely provide and receive services within the entire EC territory, and if the workforce is able to migrate freely without obstacles, the factors of production and the products themselves will move to the areas showing highest interest in them, they will be used efficiently, and the overall functioning of the European market will improve. The next section of this text will deal with the functioning of the principles of free movement of goods, persons and services.

1.5.1. Free movement of goods

Free movement of goods is based on the principle that no Member State can set rules governing the entry or sale of any goods legally produced in other Member States so as to put such goods in a disadvantageous position in comparison with goods of domestic production or so as to prevent such goods from entering its market. Therefore, Member States are forbidden to levy duties on each others´ goods that prevent the goods from being imported or exported to and from their territories. Should they do so, the affected person (i.e. the one charged for the export or import of goods) is entitled to apply to a national court and ask for reimbursement of the levied duty. This prohibition also applies to other charges that have the same effect as duties.

Moreover, Member States cannot impose any restrictions on goods produced in other Member States with respect to the amount acceptable in their markets, for example by using quantitative restrictions – i.e. direct limitations of the permitted amounts of goods to be exported or imported. Nor can they adopt any other measures of an effect equal to that of quantitative restrictions – for example measures obliging producers or importers of particular goods to mark the goods so as to show the country of origin, or measures aimed at persuading inhabitants of a Member State to buy only goods of domestic production, or setting their own requirements with respect to the exact composition of a product, its labelling, weight, shape, dimensions or any other qualities. Actually, if particular countries were to take such measures, the importers from other countries would be disadvantaged as their goods would sell worse in the county of import (for example due to the citizens of this country preferring goods of national production, or due to higher production costs resulting from the producers´ duty to meet the requirements of the country of import along with the ones set in their home countries). Such measures would definitely result in restrictions on the amount of goods which could otherwise be imported from other Member States. Nevertheless, some exceptions exist with respect to quantitative restrictions or measures with equivalent effect – for example exceptions aimed at protecting health, the environment, morals, public order and human rights.

1.5.2. Free movement of persons

Free movement of persons does not only mean the possibility of the simple movement of citizens from one Member State to another and their possibility to reside there, but it mainly refers to the possibility of EU nationals to freely migrate within the EU territory in order to perform or find work. It was the freedom to freely enter the territories of all Member States within the EU for the purposes of employment that constituted the core of the free movement of persons in the past. In the 1990s this possibility was extended to the freedom of “general”

movement, i.e. migration for educational or any other purposes, provided that certain requirements have been met.

Free movement of workers does not cover all working people. It only applies to persons performing paid work for someone else, following his or her instructions[8] – i.e. to people who are employed by other people or companies. Hence this freedom does not apply to entrepreneurs or other self-employed persons, despite the fact that such people also carry out paid work. These groups of people include freelancers or artists, and such people are subject to rules regulating free movement of services, which are often similar to those regulating free movement of workers.

Free movement of workers is based on the abolition of any kind of discrimination based on nationality as regards employment, remuneration and other working or employment conditions. Accordingly, any citizen of any Member State can come to any Member State and be employed there free of any requirement to submit a work permit, provided that he or she meets particular requirements, and subject to the existing exceptions if appropriate.

Free movement of workers is regulated in detail by the EC Treaty, a number of regulations and directives and a few judgements of the ECJ. It was the ECJ that provided quite a broad definition of "worker". This concept may even include a person receiving a wage in the host state of her employment that is lower than the minimum wage enacted by the legislation of that particular Member State. By the same token, a worker can also be a person who is unemployed and genuinely seeking work.

Regulations and directives adopted in order to specify the requirements relating to free movement of workers stipulate that Member States are obliged to issue a five-year residence permit to workers and their closest relatives which is automatically re-issued after it elapses. No residence permit is required in cases of employment not exceeding three months.

When residing in territories of Member States other than those of their origin, workers are entitled to the same treatment and benefits that are conferred upon national workers. Some benefits are also conferred on their family members. For example, workers have the right to welfare and tax benefits equal to those granted to national workers.

Relatives of migrating workers also have the right to work in the EU Member State in which a particular worker is carrying out his or her work. Children of such workers have the right to attend school under the conditions applicable to the nationals of the country in which the worker concerned is employed.

However, real enjoyment of the right of EU nationals to move freely across the territory of the EU is not only dependant on the existence of provisions allowing them to freely enter the territory of another Member State and reside there and of provisions that prohibit discrimination. Workers also have to be sure that the education they acquired in one Member State will be acknowledged in the country of their employment. Despite the independent regulation of education-related issues by each Member State, EU countries have coordinated their procedures of acknowledgement of education and diplomas obtained in individual Member States.

As mentioned above in the paragraphs dealing with free movement of persons, this freedom is not limited only to labour migration, but also includes the right to move freely across the EU countries for any other reason – for example for the purposes of education or tourism, or for the purpose of interim or permanent residence in another country. In general, all EU citizens have

[8] See the case C-66/85 *Lawrie Blum v Land Baden – Württenberg*.

the right to move and stay freely in any EU Member State. However, they have to meet a number of requirements. They must have sufficient financial resources to avoid becoming a burden on the welfare system of the host country and they must have health insurance.

After the accession of the ten new Member States to the EU in 2004, the enjoyment of free movement of workers as stipulated by the EC primary and secondary legislation was subject to the possibility of applying certain transitional periods. Transitional periods are periods of time during which the application of the free movement of workers provisions will be at the discretion of the EU Member States – both “old” as well as “new” ones. The possibility of applying transitional periods provides Member States with the chance to "get accustomed” to the new conditions and to avoid dramatic changes in their economic conditions and employment situations.

1.5.3. Free movement of services

Free movement of services is based on principles identical with those establishing the basis for free movement of goods and persons. Free movement of services means that people providing or receiving services within the EU cannot be restricted in their right to provide or receive services (with some small exceptions). However, this applies only to services containing a cross-border element. This means that freedom of services does not entail services provided and received by persons or entities coming from the same state. For example, this freedom is applicable to the situation of a citizen of one country visiting a doctor in another country, or a travel agency providing a guide service in a country other than the country in which the agency has its registered office. Such services may include, apart from the abovementioned, heath care and tourism services, services provided by pharmacists, craftsmen, sportsmen, advertising agencies, real estate agencies, etc.

Accordingly, protection against restrictions on free movement of services is ensured both with respect to service receivers (for example tourists in hotels abroad) and service providers (for example a tax advisor having his or her registered office in one Member State and providing consultancy to a client residing in another Member State). Restrictions to free movement of services may include higher prices for clients coming from abroad (museum visitors residing in the state of the museum’s location can visit the museum free of charge, but visitors coming from other Member States are required to pay for the visit).

In order to enable EU citizens to enforce their rights relating to the free movement of services as efficiently as possible, EU institutions have adopted a number of legal acts simplifying the requirements applicable to practicing some professions and the procedures for acknowledgement of diplomas and qualifications within the EU. Also, a number of directives have been adopted to regulate the practicing of some professions – for example lawyers, doctors, nurses and architects.

2. Protection of Human Rights in the European Union

At the time of the foundation of the European Communities, protection of human rights was not a priority of the Member States. The aim for which all political and legal instruments were set up was the economic unification of Europe. It was expected that economic prosperity would have a positive impact on the quality of life, and there would be no need to address protection of human rights in the traditional sense of the word. Even though there were some unique freedoms that the EEC Treaty guaranteed (free movement of workers, free movement of goods, free movement of services and free movement of capital), there seemed to be no place for the

regulation of fundamental rights and freedoms (as, for example, the right to privacy, freedom of expression or the right to a fair trial) in the founding treaties. Member States did not realise the interconnection between economic freedoms and fundamental rights and freedoms. Moreover, for cases concerning the protection of the latter rights, they relied on a special mechanism developed by the European Convention, whose aim was the protection of human rights.

As time passed, the situation started to change. The exercise of the four basic freedoms laid down by the founding treaties had a direct impact on several other rights and freedoms that EC law had been silent on. For example, the rules governing the free movement of goods, persons or services influenced the right to property, privacy, family life and freedom of speech. Affected individuals, naturally, started to demand protection of these rights.

Similar to several other cases in which the EC law did not regulate certain issues, it was the European Court of Justice that played an important role in the case of fundamental rights and freedoms. At first, this institution refused to deal with human rights issues at all, claiming that human rights were not within the scope of interest and competence of the Communities. However, later on this rhetoric started to change and the ECJ declared the protection of fundamental rights and freedoms to be one of the fundamental legal principles on which the law of the Communities was based. It pointed out that the sources upon which this protection was supposed to be founded were the constitutional traditions of the Member States. Later on, the ECJ added that international agreements on the protection of human rights were also a source of inspiration for the Communities in the field of the protection of human rights, and emphasised the importance of the European Convention as a meaningful source in this respect. The European Convention, in spite of the fact the EU is not a contracting party to it, has become a source which the bodies applying EU law look to for inspiration when seeking to resolve human rights cases. Since all EU Member States are parties to the Convention, it is obvious that they will all respect the Convention in their legal relations.

Currently we can take EC/EU law as a legal order that promotes the protection of human rights. The ECJ has also significantly contributed to the fact that binding provisions on protection of human rights have found their way into the EC Treaty and the TEU. Similarly, several provisions contained in European regulations and directives regulate the protection of fundamental rights and freedoms in a binding way.

In Europe, much more attention is paid to human rights than is reflected in the space occupied by binding legislation. EU institutions have issued many legally non-binding but morally and politically significant recommendations and declarations that indicate that human rights in the EU have found their indispensable place. Possibly the most significant of these documents is the Charter of Fundamental Rights of the European Union that enjoys growing respect among European institutions, although it is currently not legally binding. Nevertheless, the Charter has become a part of the Constitutional Treaty, and if the Treaty becomes ratified by all Member States, the Charter will become a legally binding document.

2.1. Human rights in the EC Treaty and in the Treaty on European Union

In comparison with the beginnings of the European integration, a remarkable shift can be observed in the European region in the field of human rights regulation. At the outset of the EC (then the EEC), there was not a single reference to human rights in the founding treaty. There were only economic provisions contained in it with some impact on human rights aspects of the relations they regulated. Such a provision was Article 119 of the EC Treaty (today Article 141) that laid down the obligation to reward men and women carrying out equal work with equal pay.

Another provision of similar character was Article 6 (today Article 12) that prohibited any discrimination on grounds of nationality in the areas covered by this treaty. This Article related only to citizens of the Member States and was a starting point for the functioning of the fundamental freedoms of the Community – i.e. free movement of goods, persons and services.

Today the EC Treaty contains several explicit provisions directly related to the protection of human rights. The abovementioned Article 141 was extended and enables Community institutions to adopt binding measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. With a view to ensuring full equality in practice between men and women, this article further enables Member States to maintain or adopt measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or be compensated for disadvantages in professional careers.

In relation to the equality of women and men, provisions on the tasks and activities of the Community are also worth mentioning. One of the tasks of the Community is to ensure the equality of men and women, which the Community shall promote in all of its activities.[9]

Yet another meaningful shift can be observed in the field of anti-discrimination. Through Article 13 that was added to the EC Treaty in 1999 via the Amsterdam Treaty, the EC Treaty enabled the institutions of the Union to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Even though this provision did not directly prohibit discrimination on the abovementioned grounds, it introduced the possibility that such protection would be provided for. Specifically, this provision was reflected in the anti-discrimination directives that were adopted in 2000 and 2002.

No less significant are some provisions adopted at the time the EU was established. Union citizenship does not replace but complements the national citizenships of individual Member States. It means that if an individual is a national of one of the Union´ s Member States, he or she automatically becomes a citizen of the Union. The rights connected to Union citizenship include the following:

- Every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions stipulated by binding rules of the Union.

- Every citizen of the Union has the right to vote and stand as a candidate at municipal elections in the Member State of his or her residence. By the same token, every citizen of the Union has the right to vote and to stand as a candidate in elections to the European Parliament, even if he or she resides in a Member State other than the one of his or her origin.

- Citizens of the Union have the right to consular protection in third countries (i. e. any countries that are not within the EU territory), provided that the Member State of which he or she is a national is not represented in this country. This means that if a national of any EU Member State finds himself or herself in a country outside the EU and he or she needs help, the diplomatic or consular authorities of any other EU Member State are obliged to provide him or her with help under the same conditions as in the case of their own nationals.

[9] Articles 2 and 3 of the EC Treaty.

- Every citizen has the right to petition the European Parliament. Furthermore, every citizen has the right to apply to the Ombudsman. In the same way, all EU citizens may write to any of the EU institutions, using their own languages.[10]

The EC Treaty also contains other provisions that can be considered as tools of human rights protection. Article 47 stipulates the obligation of the Council to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. Article 136 lays down that the Community and the Member States, having in mind fundamental social rights, shall have as their objectives the promotion of employment and improved living and working conditions. The EC Treaty also contains provisions on consumer protection [11] and environmental protection[12].

As regards the protection of human rights, the TEU is also important in this respect. It lays down the requirement to respect them in a much broader and general manner. Article 6 of the TEU reads as follows:

„1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

If a Member State is in a serious and persistent breach of any of the abovementioned principles, the Council can decide on suspending some rights deriving from the TEU to the Member State in question[13]. By the same token, respect for these principles is a condition for any European state applying for Union membership.[14]

2.2. Human rights in the decision-making of the ECJ

The ECJ has played an important role in the promotion of human rights in the European Union. Unlike the first years of its existence, when the Court continually refused to consider any importance of human rights in relation to the activities of the European Communities, since the 1970s the Court has gradually enhanced human rights as an attribute that cannot be omitted when dealing with issues relating to EC and EU law. In its judgements, referring mainly to the constitutional traditions common to the Member States, the European Convention, the related case-law of the ECtHR in Strasbourg[15] and a number of international documents on human rights, the Court repeatedly emphasized the importance of the promotion of human rights in EC and EU law. Furthermore, the ECJ did not hesitate to take more courageous steps that were even lacking support in the Community legislation. On the other hand, however, it is worth mentioning that the ECJ has often refused to deal with human rights issues, as there was no link, as the Court alleged, between the contested situation and Community law[16], or there was no basis for resolving a particular human rights issue in the Community legislation[17].

[10] See Articles 17-21 of the EC Treaty.
[11] Article 153 of the EC Treaty.
[12] Article 174 of the EC Treaty.
[13] Article 7 of the TEU.
[14] Article 49 of the TEU.
[15] Although in some cases the ECJ's opinions contradict the legal opinions of the ECtHR in Strasbourg.
[16] See for example case C-159/90 *SPUC v Grogan.*
[17] See for example case C-249/96 *Grant v South West Trains*.

A number of examples can be presented to document the cases when the ECJ handed down judgements related to human rights. They included statements concerning the protection of private and family life, property rights, freedom of expression, freedom of religion, protection against discrimination, freedom of association including the right to associate in trade unions, the right to practice a profession, the right to judicial protection and the right to confidentiality between lawyers and their clients.

The next section deals in detail with a number of cases in which the ECJ delivered its opinion as regards some of the abovementioned rights.

2.2.1. Protection of private and family life

The Court has dealt with the right to privacy and protection of family life in a number of cases. Questions relating to the **right to privacy** were raised in *X v Commission*[18]. The Court was to resolve the situation of Mr. X who was denied employment as a staff member of the Commission. The reason for rejecting Mr. X was that his immunity system was seriously weakened, and that he was physically unfit to carry out duties for the Commission according to the Commission medical officer performing the pre-hiring medical examination, on the basis of results of a test which Mr. X had been subject to. However, Mr. X underwent the test without his consent, and this test was carried out after Mr. X had declined to undergo another screening for AIDS. This involuntarily taken "substitute" test indirectly indicated that Mr. X suffered from this disease. In its judgement the Court delivered the following opinion:

"The Court of Justice has held that the right to respect for private life, embodied in Article 8 of the European Convention (...) and deriving from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the legal order of the Community (...). It includes in particular a person' s right to keep his state of health secret."[19]

However, although the Court stated further that the health examination of candidates for posts within the Commission served a legitimate interest, as the personnel of the Commission must be able to properly fulfil their duties, it continued as follows:

"(...) the right to respect for private life requires that a person' s refusal [to be subject to the test] be respected in its entirety. Since the appellant [Mr. X] expressly refused to undergo an AIDS screening test, that right precluded the administration from carrying out any test liable to point to, or establish, the existence of that illness (...)."[20]

In other words, the Court stated that not even a reasonable requirement of a Community institution to carry out a pre-hiring medical examination of their potential employees in order to evaluate their ability to properly fulfil their duties may justify the carrying out of a medical test against the will of the person concerned. On the other hand the Court stated that if the applicant concerned withholds his or her consent to such test, the institution concerned cannot be obliged to take the risk of hiring a person who is not physically fit for his or her post and it can hence decide not to hire such a person.

An example of a case where the ECJ dealt with the **protection of family life** is the case of *Mary Carpenter*[21]. Mrs. Carpenter, a national of the Philippines, was given leave to enter the UK

[18] C-404/92 P *X v Commission.*
[19] Para 17 of the judgement.
[20] Para 23 of the judgement.
[21] C-60/00 *Mary Carpenter.*

as a visitor. However, after her leave had expired, she stayed in Britain and after some time married Mr. Carpenter, a UK national. They lived a decent family life. Mr. Carpenter ran his own business and often travelled to other Member States as he was providing his services also to clients from other countries. His wife took care of the household and looked after his children from a previous marriage.

After a period of time, the UK authorities found out that Mrs. Carpenter had overstayed her visa and decided to issue a deportation order against her in accordance with UK law. This meant that if the family wanted to stay together, all the members would have to leave the UK for the Philippines. Otherwise Mr. Carpenter would have to stay with his children in the UK alone, and such a situation would, *inter alia*, restrict his business activities as it would be much more complicated for him to carry out his business without his wife looking after his children. Mrs. Carpenter used this argument before the ECJ where she alleged that her deportation would restrict her husband's right to provide services within the Union. Despite the fact that Mrs. Carpenter's right to stay in the UK was not directly supported by any Community instrument regulating the free movement of persons, the Court emphasised that protection of human rights was one of the principles applied by the Community, and decided as follows:

"It is clear that the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter exercises a fundamental freedom [i.e. the freedom to provide services]. That freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.

A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (...).

The decision to deport Mrs. Carpenter constitutes an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the [European] Convention (...)."[22]

2.2.2. Freedom of faith and religion

The Court dealt with freedom of faith in the *Prais* case[23]. Ms Prais, a Jewish believer, applied for a position of Council interpreter. The hiring process should have involved a written test. After the Council had fixed the date for the examination, Ms Prais informed them that she would be unable to take the test on that day as it was the first day of a Jewish feast during which Jews are not permitted to write or travel. Therefore, she asked the Council to respect the right of the candidates to be protected against any discrimination on religious grounds and to fix another date for the test.

During the judicial proceedings the Council representatives insisted that if the hiring process required a written test, then it was essential that all candidates have equal conditions, which was to say that all candidates should be examined by passing the same test on the same day. They also pointed out that the obligation to find out about the religion of every applicant for a job in their institution would mean an excessive burden for them.

In resolving this case the Court made a kind of compromise between Ms Paris's claims and the allegations of the Council. On the one hand, the Court acknowledged that it was of a great

[22] Paras 39-41 of the judgement.
[23] C-130/75 *Prais v Council.*

importance that the date of the written test be the same for all candidates in order to ensure the principle of equal treatment for everyone. On the other hand, the Court stated that the interests of candidates not able to participate in the test due to religious reasons had to be balanced against this necessity. Therefore, the Court stated that if the candidate concerned informs the appointing authority that her or his religious reasons make certain dates impossible for her or him, the appointing authority *"should take this into account in fixing the date for written tests and endeavour to avoid such dates."*[24] On the other hand, if the candidate does not inform the appointing authority in good time, the authority is authorised to refuse such a requirement, particularly if there are other candidates who have been notified of the test.

In the case of Ms Prais, the Court did not accept her reasons for suing the Council as she informed the Council of her requirement quite late, after the rest of the candidates had been notified of the test. Thus the *Prais* case is a good example of the necessity of considering the actual circumstances of each case in terms of judicial decision-making in general and in this particular case, and the necessity of maintaining the balance between particular and often antagonistic interests and values.

2.2.3. Freedom of expression

The Court dealt with issues related to freedom of expression in the *Connolly* and *Familapress* cases. In *Connolly versus Commission*[25], the Court was to resolve a dispute between Mr. Connolly, a former high ranking official of the Commission, and the Commission. Mr. Connolly was removed from his post after he had written a book titled *The Rotten Heart of Europe: The Dirty War for Europe's Money* without previously requesting permission from the Commission to publish the book, which was required by the Commission´ s Staff Regulations. The case appeared before the ECJ where Mr. Connolly alleged, *inter alia*, that the obligation of the staff to apply for the Commission's permission to publish any work relating to the European Community restricted his right to freedom of expression.

Therefore, the Court dealt with the question of to what extent it is acceptable to restrict the freedom of expression, which is one of the freedoms protected by the European Convention and one of the fundamental freedoms respected by the EU. The Court acknowledged that the freedom of expression indeed held great importance and referred to the case law of the ECtHR, according to which freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[26] The Court also dealt with the question of whether it is possible to restrict the freedom in question via the obligation imposed on the staff of a Community institution to inform the Commission on any publication in preparation (concerning the EC) and apply for permission to publish it. As regards this issue the Court concluded the following:

"In terms of Article 10 of the European Convention [regulating the freedom of expression], specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.

(...) So an official [of an EU institution] may not, by oral or written expression, act in breach of his obligations (...) towards the institution that he is supposed to serve. That would destroy the

[24] Para 16.
[25] C-274/99 P *Connolly v Commission.*
[26] Para 39 of the judgement.

relationship of trust between himself and that institution and make it thereafter more difficult, if not impossible, for the work of the institution to be carried out in cooperation with that official."[27]

The Court hence concluded that one of the justifications for restricting the freedom of expression could be the legitimate aim of protecting the rights of an institution responsible to the public for carrying out its tasks effectively, provided that this restriction serves the aim of preserving the relationship of trust between the institution and its employees. Therefore, the requirement for a prior permission to publish a work relating to the Commission need not be, as such, contrary to the right to freedom of expression.

However, the Court also stated that a **fair balance** must be struck between the individual's right to freedom of expression and its potential restrictions. In other words, no potential restriction applied by the Commission towards its staff can be disproportionate to the right of a particular employee to freely express his or her opinions concerning the issues relating to his or her work. In the case of Mr. Connolly, the Court bore the Commission out on their decision. The reason for upholding the Commission´ s decision was mainly that according to the Commission´ s rules, the cases where the Commission could refuse to issue permission to publish works relating to the Community, written by its employees, were rare and could only be justified where the proposed publication was liable to seriously endanger the interests of the Communities. Also, the Court considered the fact that Mr. Connolly failed to request the permission to publish his book and he published it on his own initiative, even though he could have assumed that he would be refused permission due to the content of his book - on the same grounds as those on which the Commission had previously refused to permit its employees to publish their works.

In case of *Familiapress,*[28] the Court was to judge on a prohibition issued by Austrian authorities that prevented publishers from providing free gifts together with their marketed periodicals. The Court agreed with the arguments of Austria that offering free gifts, which only large publishers can afford, may force small publishers out of the market and thus endanger the diversity of the press which is one of the pillars of the freedom of expression guaranteed by the European Convention and which is considered to be one of the fundamental principles of a democratic society. Therefore, the Court found the requirement to safeguard the freedom of expression and thus maintain the diversity of the press to be so important that it could even justify some restrictions of the free movement of goods within the EU.

2.2.4. Protection against discrimination

In its activities, the ECJ has dealt with many cases of discrimination, albeit only on the grounds of sex in the field of employment, since only this form of discrimination was prohibited by EC legislation at the beginning of its existence. Also in the *P v S* case[29], the ECJ based its decision on the Community legislation that prohibited discrimination on the grounds of sex in the field of employment. This decision has had, however, much broader impact, since the ECJ also touched upon the question of human dignity.

In *P v S*, the issue was as follows: After Ms P, an employee of an educational institution, had her sex changed from male to female through a medical operation, her employer released her from her job, arguing that he would have done the same to any woman working at his workplace who underwent surgery to change her sex - i.e. from female to male -, and therefore there was no discrimination whatsoever. However, the ECJ did not share this opinion and compared the situation of Ms P to the situation of any man – a representative of the sex Ms P had belonged to

[27] Paras 46 and 47.
[28] C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs- GmbH v Heinrich Bauer Verlag.*
[29] C-13/94 *P v S and Cornwall County Council.*

before. After the comparison with an imaginary member of the opposite sex who did not change his sex, the ECJ ruled that this case represented discrimination on the grounds of sex, as discrimination on the grounds of sex is not restricted to cases when a person is of a specific sex, but also includes cases where a person changes her or his sex. The ECJ continued as follows:

"To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."[30]

However, in the case of *Grant*[31] the ECJ did not hold the same line. Ms Grant, a lesbian working for a transport company, addressed the Court after this company refused to recognise a fare discount for her same-sex partner with whom she cohabited, although the accused company provided such fare discounts to non-married spouses of the opposite sex. After Ms Grant compared her situation to the situation of her male colleague, whose opposite-sex partner managed to have the discount granted, she claimed that the transport company discriminated her on the grounds of sex. The ECJ, however, adopted the opposite opinion, a completely different one from that in the *P v S* case. The Court compared the situation of Ms Grant to the situation of an imaginary male and his male partner to whom the company would behave in the same way, thus ruling that there was no discrimination in this case.

Although it is not possible to draw a single conclusion about the approach of the ECJ towards human rights issues solely on the basis of the abovementioned cases, it can be said that in general it seems that the ECJ does not follow an approach that would reflect a permanent and principled effort to protect human rights. Even though in some cases the ECJ tried to "overstep its own shadow" (as e.g. in the abovementioned cases of *Mary Carpenter* or *P v S*), many human rights advocates blame it for making "much ado about nothing" and for its unpredictable and unprincipled decisions.

2.3. Charter of Fundamental Rights of the European Union

The adoption of the Charter of Fundamental Rights of the European Union (The Charter) has been an important milestone in the development of the protection of human rights in the EU. This document was drafted by the Council, the Commission and the European Parliament and was adopted at a meeting in Nice in 2000.

The Charter is currently not a legally binding document. According to the statements included in its Preamble, the Charter deems it necessary to strengthen the protection of fundamental rights, and for this purpose they are made more visible in the Charter. Also, it is stated in the Preamble that the Charter reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the TEU, the Community Treaties, the European Convention, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the ECJ and the ECtHR.

Although the Charter is currently not a legally binding document, it is of a great importance for EU citizens. It removes any doubts with respect to the protection of human rights as an avowed value of the EU. Moreover, citizens are for the first time provided with a single document explaining which particular rights, and to what extent, are protected in the Union. Definitely, the latter advantage represents an immense benefit of the Charter –ordinary EU inhabitants will no longer need to worry about getting lost in a tangle of agreements, directives, ECJ judgements

[30] Para 22 of the judgement.
[31] C-249/96 *Grant v South West Trains.*

and other documents, but can directly find information regarding the content and scope of the protection of their rights.

Rights are divided into six chapters in the Charter. The first chapter, titled “Dignity”, covers the protection of such rights as human dignity, the right to life or rights applicable in the field of medicine and biology. The second chapter, titled “Freedoms”, covers the respect for private and family life, the protection of personal data and the right to marry and start a family. The third chapter, “Equality”, provides for, *inter alia*, protection against discrimination, cultural, religious and linguistic diversity, rights of the child, rights of persons with disabilities and rights of the elderly. The fourth chapter, titled “Solidarity”, summarises, most of all, EU regulations existing in the field of social and labour law. It also contains environmental protection and consumer protection clauses. The fifth chapter covers the rights of EU citizens. The sixth chapter, titled “Justice”, deals with the right to legal and judicial protection.

The Charter declares itself to be a document summarizing the rights and freedoms stipulated in the abovementioned documents and interpreted via the decision-making processes of the European courts. However, it is more modern and exceeds the scope of the European Convention and EU legislation in some aspects. This can be fully documented by the existence of the prohibition of reproductive cloning of human beings, the rights of the elderly to lead a life of dignity and independence and their right to participate in social and cultural life and by the scope of the prohibition of discrimination.

Nowadays, the Charter has become a part of the Constitutional Treaty that is supposed to, if ratified by all Member States, serve as a constitution for Europe.

3. Glossary

Acquis communitaire: See Law of the European Community.

Charter of Fundamental Rights of the European Union (Charter): A document adopted at the Nice summit in 2000 that consolidates the fundamental rights applicable at Union level. In its seven chapters divided into 54 articles, the Charter defines fundamental rights relating to dignity, liberty, equality, solidarity, citizenship and justice. At present, the Charter is not legally binding. However, it is a part of the *Treaty Establishing a Constitution for Europe* that is currently in the process of ratification. Thus if the Constitution is ratified, the Charter will become a legally binding document.

Citizenship of the European Union: Citizenship that does not replace but complements the national citizenships of individual Member States. It means that if one is a national of one of the Union´ s Member States, he or she automatically becomes a citizen of the Union. There are some special rights conferred on EU citizens through this institution, such as the right to move and reside freely within the territory of the EU or the right to consular protection in third countries.

Council of Europe: An international organisation associating 46 European countries (all EU Member States are members of the Council of Europe) that was established in 1949. One of the objectives of the Council of Europe is the protection of human rights. In 1950, the member states of the Council of Europe adopted the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

Council of the European Union (the Council): The most important legislative institution of the EU with its seat in Brussels. It is composed of members of the governments of individual

Member States at the ministerial level. One of the members always presides over the Council for six months on the principle of rotation.

Direct Effect: If a certain provision of a piece of EU legislation conferring rights on individuals is sufficiently precise and simultaneously meets other requirements stipulated by the *European Court of Justice*, the individuals subject to a violation of their rights stemming from this provision are entitled to claim these rights before their respective national courts against the Member States or against other individuals.

Directive: A piece of European legislation adopted by EU institutions that is addressed to Member States and that requires them to achieve specified results.

EC Law: See **Law of the European Community.**

European Commission (the Commission): An EU institution having both legislative and executive functions. It is composed of 25 members (Commissioners) and is located in Brussels. The Commission is sometimes also called as the "guardian of the Treaties", as it secures control over fulfilling obligations stemming from *EC law* by individual Member States.

European Community (the EC): An economic and political association of European States that originated as the *European Economic Community* (EEC). It was created by the Treaty of Rome in 1957 with the broad objective of furthering economic development within the Community.

European Convention for the Protection of Human Rights (European Convention, ECHR): A convention, originally formulated in 1950, aimed at protecting the human rights of all people in the member states of the *Council of Europe*.

European Council: The main political body of the EU. It consists of the heads of states or governments of the individual Member States and the President of the *European Commission,* who are assisted by the ministers of foreign affairs.

European Court of Human Rights (ECtHR): A permanent judicial institution of the *Council of Europe*, established by the *European Convention for the Protection of Human Rights*. It ensures the enforcement of the obligations entered into by the contracting states of the European Convention that are entrenched in the Convention. The Court is located in Strasbourg.

European Court of Justice (ECJ): The main judicial institution of the European Union located in Luxembourg, composed of one judge per Member State. Its task is to ensure that the law is observed in the interpretation and application of the EC Treaty.

European Ombudsman (the Ombudsman): Person appointed by the *European Parliament* whose mission is to receive and investigate complaints from EU citizens or other persons residing in the Union that deal with instances of maladministration in the activities of the Community institutions, with the exception of its judicial bodies.

European Parliament (the Parliament): A representative body of the EU with its seat in Strasbourg. It consists of 732 members who represent more than 450 million EU citizens. Members of the Parliament are elected by the citizens of the Union in direct elections every five years. The Parliament has no right of legislative initiative but in many cases it has co-decisive powers, or the Council is at least obliged to consult with it. It also has several supervisory powers. In addition, every EU citizen has the right to address the Parliament with petitions, both individually and collectively.

European Union (the Union, EU): An association of (currently) 25 European States founded by the Treaty on European Union (the Maastricht Treaty) in 1993 which amended the founding treaties of the European Communities. The Union is based on *three pillars* which form its basic structure.

Harmonisation of Laws: The process by which states make changes in their national laws, in accordance with Community legislation, to produce proximity or uniformity.

Internal Market: An area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

Law of the European Community (EC law, *acquis communitaire*): An area of law that, although being a part of EU law, is narrower in its scope, as it represents only the first pillar of the Union. The provisions belonging to this pillar are legally binding.

Principle of Subsidiarity: The principle is intended to ensure that decisions are taken as closely as possible to citizens and that constant checks are made as to whether action at Community level is justified. Specifically, it is the principle whereby the EC does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at the national, regional or local level.

Principle of Supremacy: The principle of supremacy says that in cases of conflict, EU law takes precedence over the law of individual Member States.

Regulation: A piece of European legislation adopted by EU institutions which is of general application, binding in its entirety and directly applicable in all Member States without the need for individual Member States to enact these domestically.

Rule of Law: A legal principle that is essential to legal systems of democratic countries and their coalitions. In short, it means the supremacy of law where all are equally subject to law administered by courts and where the government has no arbitrary authority over the citizens. Citizens´ rights and freedoms are also formulated and protected by law.

Three Pillars of the European Union: Pillars which form the basic structure of the EU. These are: 1) the Community dimension, comprising the arrangements set out in the *European Community*, European Coal and Steel Community and European Atomic Energy Community Treaties - e. g. Union citizenship, Community policies, Economic and Monetary Union, etc. (first pillar); 2) the common foreign and security policy (second pillar); 3) police and judicial cooperation in criminal matters (third pillar).

Treaty Establishing a Constitution for Europe (Constitutional Treaty): A document that was put together by a Convention composed of representatives of governments and national parliaments of the Member States, representatives of the *European Parliament* and the *Commission*, that if ratified by all Member States, is supposed to serve as the European constitution. The Constitutional Treaty is supposed to achieve the objectives of improved democracy and better effectiveness of the Union by various measures contained in four parts.

4. Table of Treaties, Instruments and Legislation

Charter of Fundamental Rights of the European Union (2000). The document is available at http://www.europarl.eu.int/charter/default_en.htm

Council Regulation of 15 October 1968 on freedom of movement for workers within the Community (1612/68/EEC). *The document is available at http://www.ilo.org/public/english/employment/skills/recomm/instr/eu_26.htm*

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) The document is available at http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/

Treaty Establishing a Constitution for Europe (2004). The document is available at http://europa.eu.int/constitution/index_en.htm

Treaty Establishing the European Community (Consolidated Version). The document is available at http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.html

Treaty on European Union (Consolidated Version). The document is available at http://europa.eu.int/en/record/mt/top.html

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Wyatt, D. (ed.), *Rudden & Wyatt´s EU Treaties & Legislation* (United States: Oxford University Press, 2002).

6. Useful Websites

http://www.coe.int
Official website of the Council of Europe.

http://www.curia.eu.int
Website of the European Court of Justice.

http://www.echr.coe.int/echr
Website of the European Court of Human Rights.

http://www.euro-ombudsman.eu.int
Website of the European Ombudsman.

http://www.europa.eu.int
Official Website of the European Union.

http://www.europa.eu.int/comm/index_en.htm
Website of the European Commission.

http://www.europa.eu.int/eur-lex/lex/en/index.htm
A website that provides direct access to EU law.

http://www.europarl.eu.int
Official Website of the European Parliament.